Office - Supreme Court, U.S.
FILED
SEP 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-180

In the

Supreme Court of the United States

OCTOBER TERM, 1982

BENJAMIN A. RASKY,

Petitioner.

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a/k/a CBS-WBBM, a corporation, SUSAN ANDERSON, ELLIS B. LEVIN, EDGEWATER COMMUNITY COUNSEL, ORGANIZATION OF THE NORTHEAST, EDGEWATER RESIDENTS TOGETHER IN ACTION, 5600 BLOCK CLUB OF WINTHROP, corporations, MARION VOLINI, LEROY BLOMMAERT, DALE BURTON, GLORIA BITTNER (a/k/a BITNER), DAVID WALKER, FABIO RINCON, KELLY SANDERS, ALBERT GRIFFIN, and unknown officers and directors of the foregoing community organizations, CHICAGO READER, INCORPORATED, a corporation, and DON ROSE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

BRIEF OF RESPONDENTS CHICAGO READER, INCORPORATED AND DON ROSE IN OPPOSITION

STEVEN B. BELGRADE
ROAN & GROSSMAN
55 West Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 263-3600
(Counsel of Record for Respondents)

DAVID W. ANDICH
ROAN & GROSSMAN
55 West Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 263-3600

The Scheffer Press, Inc.—(312) 263-6850

QUESTION PRESENTED

1. Whether the Appellate Court of Illinois, in applying well-established principles of Illinois defamation law to determine that Count VII of petitioner's complaint failed to allege a cause of action for libel, denied petitioner due process of law.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
Introduction	2
The Decisions Below	3
REASONS FOR DENYING THE WRIT	4
I. The Appellate Court Of Illinois Correctly Applied The Well Established Law of Illinois In Defamation Actions And Properly Concluded That Petitioner Had Not Stated A Cause Of Action In Libel	5
A. The Respondents' Article Is Capable Of An Innocent Construction	6
B. The Respondents' Article Is Not Libelous Per Se	9
1. The Article Does Not Accuse Petitioner Of The Commission Of A Serious Crime	9
2. The Article Does Not Accuse Petitioner of Professional Unfitness As An Attorney	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

Abbott v. *National Bank of Commerce*, 175 U.S. 409 (1899) 5

Anderson v. *Matz*, 67 Ill.App.3d 175, 384 N.E.2d 759 (1978) 8

PAGE

Andreani v. *Hansen*, 80 Ill.App.3d 726, 400 N.E.2d 679 (1980) 8

Archibald v. *Belleville News Democrat*, 54 Ill.App.2d 38, 203 N.E.2d 281 (1964) 8

Ashe v. *Hatfield*, 13 Ill.App.3d 214, 300 N.E.2d 545 (1973) 7

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 5

Bougadis v. *Langefield*, 69 Ill.App.3d 1010, 387 N.E. 2d 965 (1979) 9

Bravo Realty, Inc. v. *Columbia Broadcasting System, Inc.*, 84 Ill.App. 3d 862, 406 N.E.2d 61 (1980) 6, 8

Bruck v. *Cincotta*, 56 Ill.App.3d 260, 371 N.E.2d 874 (1970) 10

Conrad v. *Logan*, 4 Ill.App.3d 981, 283 N.E.2d 54 (1972) 8

Cooper v. *Rockford Newspapers, Inc.*, 50 Ill.App.3d 247, 365 N.E.2d 744 (1977) 7

Dauw v. *Field Enterprises, Inc.*, 78 Ill.App.3d 67, 397 N.E.2d 41 (1979) 6

Equitable Life Assurance Society v. *Brown*, 187 U.S. 308 (1902) 5

Hambric v. *Field Enterprises, Inc.*, 46 Ill.App.2d 355, 196 N.E.2d 489 (1964) 11

Jacobs v. *Gasoline Retailers Association*, 28 Ill.App. 3d 7, 328 N.E.2d 187 (1975) 7

John v. *Tribune*, 24 Ill.2d 437, 181 N.E.2d 105, *cert. denied*, 371 U.S. 877 (1962) 6

Kakuris v. *Klein*, 88 Ill.App.3d 597, 410 N.E.2d 984 (1980) 8

Krass v. *Froio*, 24 Ill.App.3d 924, 322 N.E.2d 67 (1975) 7

LaGrange Press v. *Citizens Publishing Co.*, 252 Ill. App. 482 (1929) 6

PAGE

Lorillard v. *Field Enterprises*, 65 Ill.App.2d 65, 213 N.E.2d 1 (1965) 8

Millingar v. *Hartupee*, 73 U.S. (6 Wall.) 258 (1867) .. 5

Mitchell v. *Peoria Journal-Star, Inc.*, 76 Ill.App.2d 154, 221 N.E.2d 516 (1966) 9, 10

Proesel v. *Myers Publishing Co.*, 24 Ill.App.2d 501, 165 N.E.2d 352 (1960) 8

Reed v. *Albanese*, 78 Ill.App.2d 53, 223 N.E.2d 419 (1966) 9

Roemer v. *Zurich Insurance Company*, 25 Ill.App.3d 606, 323 N.E.2d 582 (1975) 7

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 5

Sloan v. *Hatton*, 66 Ill.App.3d 41, 383 N.E.2d 259 (1978) 6

Tunnel v. *Edwardsville Intelligencer, Inc.*, 43 Ill.2d 239, 252 N.E.2d 538, *cert. denied*, 397 U.S. 1021 (1970) 7

Valentine v. *North American Company*, 60 Ill.2d 168, 328 N.E.2d 265 (1974) 6, 7

Van See Construction Company, Inc. v. *Jensen & Halsted, Ltd.*, 79 Ill.App.3d 1084. 399 N.E.2d 278 (1979) 8

Watson v. *Southwest Messenger Press, Inc.*, 12 Ill. App.3d 968, 299 N.E.2d 409 (1973) 7

Wexler v. *Chicago Tribune Company*, 69 Ill.App.3d 610, 387 N.E.2d 892 (1979) 6

Young v. *Richardson*, 4 Ill.App. 364 (1879) 6

Zeinfeld v. *Hayes Freight Lines, Inc.*, 41 Ill.2d 345, 243 N.E.2d 217 (1968) 7

Zucht v. *King*, 260 U.S. 174 (1922) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-180

BENJAMIN A. RASKY,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a/k/a CBS-WBBM, a corporation, SUSAN ANDERSON, ELLIS B. LEVIN, EDGEWATER COMMUNITY COUNSEL, ORGANIZATION OF THE NORTHEAST, EDGEWATER RESIDENTS TOGETHER IN ACTION, 5600 BLOCK CLUB OF WINTHROP, corporations, MARION VOLINI, LEROY BLOMMAERT, DALE BURTON, GLORIA BITTNER (a/k/a BITNER), DAVID WALKER, FABIO RINCON, KELLY SANDERS, ALBERT GRIFFIN, and unknown officers and directors of the foregoing community organizations, CHICAGO READER, INCORPORATED, a corporation, and DON ROSE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

BRIEF OF RESPONDENTS CHICAGO READER, INCORPORATED AND DON ROSE IN OPPOSITION

STATEMENT OF THE CASE

Introduction

This cause was initiated by the filing of a five count complaint, supplemented by a two count amended complaint, against respondents in the Circuit Court of Cook County, Illinois. Count VII of the amended complaint sought damages for defamation against respondents Chicago Reader, Incorporated (the "Reader") and Don Rose ("Rose"), based on a newspaper article written by Rose and published in the *Reader* newspaper on November 11, 1977. The article, entitled "Why Ellis Levin Is A Marked Man," discussed various community issues and problems in Levin's legislative district. After Levin noted the importance of staying in touch with community problems and providing a resource through government to resolve them, the article stated:

> One agency he [Ellis Levin] recently got to do its job is the Illinois Department of Registration and Education, which licenses real estate operators but never saw fit to crack down on slum landlords until Levin lit the fuse. The result: for the first time in history a slum landlord operating in Uptown, Benjamin A. Rasky, is under the gun to fix up his places or lose his license.

Petitioner alleged that this statement constituted libel *per se.*

The basis for the two sentence reference to petitioner was a complaint filed by the Department of Registration and Education of the State of Illinois ("DRE") against petitioner for numerous building code violations on properties which he owned and operated. Following a hearing, the DRE revoked petitioner's real estate license. The DRE's decision was affirmed by the Appellate Court

of Illinois in *Rasky* v. *Department of Registration and Education*, 87 Ill.App.3d 580, 410 N.E.2d 69 (1980). This Court subsequently dismissed the petitioner's appeal for want of a substantial federal question. 102 S.Ct. 78 (1981).

The Decisions Below

In the present action, respondents Reader and Rose filed their motion to dismiss Count VII. Based upon its review of petitioner's complaint, respondents' motion and the briefs and oral arguments of all the parties, the trial court dismissed Count VII, with prejudice, holding that it failed to state a cause of action. The court applied the well-established Illinois "rule of innocent construction" and held that the allegedly defamatory statement was not libelous. On November 23, 1981, the Appellate Court of Illinois affirmed the trial court's dismissal, concluding

> that a proper application of the rule of innocent construction necessitates a finding that the term 'slumlord' or 'slum landlord' as used in the several publications, is susceptible of an innocent construction.

Rasky v. *Columbia Broadcasting System, Inc.*, 103 Ill. App.3d 577, 582, 431 N.E.2d 1055, 1059 (1981).

On February 1, 1981, the Appellate Court of Illinois denied petitioner's request for rehearing. On May 28, 1982, the Supreme Court of Illinois denied petitioner's request for leave to appeal the decision of the Appellate Court.

REASONS FOR DENYING THE WRIT

This case is wholly unremarkable in every respect. It is totally devoid of any unusual, novel, or significant issues of state or federal law. Petitioner's arguments are a mere rehash of points thoroughly considered, and properly rejected, by both the Illinois trial and appellate courts. Petitioner now seeks to have this Court review the allegations of his complaint to determine whether the allegations of Count VII state a cause of action under the Illinois law of defamation. However, this is a wholly insufficient basis upon which to invoke the certiorari jurisdiction of this Court.

The Petition satisfies *none* of the standards of Supreme Court Rule 17 for the granting of a writ of certiorari to review a state court judgment. The Illinois courts have not decided a federal question in a way which conflicts with the decision of another state or federal court. Nor have these courts decided an important question of federal law which has not been, but should be, settled by this Court.

In essence, petitioner makes the bare assertion that the decision of the Appellate Court is erroneous in its application of well-settled Illinois law and, therefore, the dismissal of Count VII deprives him of his constitutional rights. But, as will be demonstrated below, Illinois law is clear, and the decision of the Appellate Court in this case was correct. Under these circumstances, review by this Court is plainly unwarranted.

Moreover, it is a long-established principle that this Court will not review the decision of a state court which

presents no substantial federal question. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Zucht* v. *King*, 260 U.S. 174 (1922); *Millingar* v. *Hartupee*, 73 U.S. (6 Wall.) 258 (1867). It is equally well settled that the bare assertion of a constitutional claim utterly without foundation, or one so clearly and conclusively settled by prior decisions of this court so as to admit of no further argument, presents no substantial federal question. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 314 (1902). Petitioner's assertion here that a due process question is raised by the action of the Illinois courts is groundless and unsupportable, being merely an attempt to seek this Court's review of questions of state law. *See Abbott* v. *National Bank of Commerce*, 175 U.S. 409 (1899), where this Court declared that the dismissal of a libel action on grounds of privilege raised no Fourteenth Amendment issue. *See also Boddie* v. *Connecticut*, 401 U.S. 381, 378 (1971) (no deprivation of due process to enter default judgment for failure to appear or failure to comply with procedural rules). Accordingly, this Court should deny this petition for a writ of certiorari.

I. The Appellate Court of Illinois Correctly Applied The Well Established Law of Illinois In Defamation Actions and Properly Concluded That Petitioner Had Not Stated A Cause Of Action In Libel.

The Appellate Court's holdings that petitioner failed to state a cause of action because the purportedly defamatory language could be innocently construed and was not libel *per se* is entirely consistent with established Illinois law enunciated decades ago.

A. The Respondents' Article Is Capable Of An Innocent Construction.

The principles of Illinois defamation law relied upon by the Appellate Court in affirming the dismissal of the allegedly libelous statement are long-standing. Illinois courts have consistently held that if an allegedly libelous article can be innocently construed upon any reasonable reading, it must be dismissed as nonactionable. *Valentine* v. *North American Co.*, 60 Ill.2d 168, 171, 328 N.E.2d 265, 267 (1974); *John* v. *Tribune Co.*, 24 Ill.2d 437, 442, 181 N.E.2d 105, 108, *cert. denied*, 371 U.S. 877 (1962); *LaGrange Press* v. *Citizens Publishing Co.*, 252 Ill.App. 482 (1929); *Young* v. *Richardson*, 4 Ill.App. 364 (1879). In *John*, the court stated:

> We further believe the language of defendant's article is not libelous of plaintiff when the innocent construction rule is consulted. That rule holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law.

The meaning of the statement must be gathered not only from the words singled out, but from the context. *Bravo Realty, Inc.* v. *Columbia Broadcasting System, Inc.*, 84 Ill.App.3d 862, 406 N.E.2d 61 (1980); *Sloan* v. *Hatton*, 66 Ill.App.3d 41, 383 N.E.2d 259 (1978). Moreover, the words must be read in their best possible sense. *Wexler* v. *Chicago Tribune Co.*, 69 Ill.App.3d 610, 387 N.E.2d 892 (1979); *Dauw* v. *Field Enterprises, Inc.*, 78 Ill.App.3d 67, 397 N.E.2d 41 (1979). This rule applies irrespective of whether the plaintiff or anyone else can suggest other interpretations of the statement which might be

defamatory. Only if no possible innocent understanding of an article is reasonably conceivable may the court declare its words to be actionable. *Zeinfeld* v. *Hayes Freight Lines, Inc.*, 41 Ill.2d 345, 347-48, 243 N.E.2d 217, 227 (1968).

Applications of the innocent construction rule are legion. It has consistently been invoked by Illinois courts to uphold the dismissal of libel actions. *See, e.g., Valentine* v. *North American Co.*, 60 Ill.2d 168, 328 N.E.2d 265 (1974) (statement that an insurance company was discharging plaintiff because "He was a lousy agent"); *Tunnell* v. *Edwardsville Intelligencer, Inc.*, 43 Ill.2d 239, 252 N.E.2d 538, *cert. denied*, 397 U.S. 1021 (1970) (statement that a city attorney "was working to break the law"); *Cooper* v. *Rockford Newspapers, Inc.*, 50 Ill.App. 3d 247, 365 N.E.2d 744 (1977) (statement that a deputy clerk of the court was a "political hack," "hired in lieu of modernization and data processing"); *Jacobs* v. *Gasoline Retailers Association*, 28 Ill.App.3d 7, 328 N.E. 2d 187 (1975) (statement that reported a judgment of $4,435 against plaintiff, a business manager, in which he was pictured on a "wanted" poster); *Roemer* v. *Zurich Insurance Co.*, 25 Ill.App.3d 606, 323 N.E.2d 582 (1975) (statement that plaintiff made "sexual advances"); *Krass* v. *Froio*, 24 Ill.App.3d 924, 322 N.E.2d 67 (1975) (statement that the unknown powers in a trust will do anything to influence the outcome of an election and that people should ask plaintiff about the new home offered to a trustee just after his election); *Ashe* v. *Hatfield*, 13 Ill.App.3d 214, 300 N.E.2d 545 (1973) (statement that criticized plaintiff's work as a journalist); *Watson* v. *Southwest Messenger Press, Inc.*, 12 Ill.App.3d 968, 299 N.E.2d 409 (1973) (statement that plaintiff "fixed

parking tickets"); *Conrad* v. *Logan*, 4 Ill.App.3d 981, 283 N.E.2d 54 (1972) (statement that plaintiffs took money out of the company); *Lorillard* v. *Field Enterprises, Inc.*, 65 Ill.App.2d 65, 213 N.E.2d 1 (1965) (statement that plaintiff had obtained a "quickie divorce"); *Archibald* v. *Belleville News Democrat*, 54 Ill.App.2d 38, 203 N.E.2d 281 (1964) (statement expressing disgust at seeing a fourteen year old girl riding in a convertible "half-naked"); *Procsel* v. *Meyers Publishing Co.*, 24 Ill.App.2d 501, 165 N.E.2d 352 (1960) (statement that a public official was "diverting" funds from one project to another); *Kakuris* v. *Klein*, 88 Ill.App.3d 597, 410 N.E.2d 984 (1980) (statement that plaintiff executive, terminated from his job, had a lack of achievement in basic goals, did not have the qualifications needed to achieve professional objectives, and that sources "refused to comment" as to plaintiff's "honesty and integrity"); *Bravo Realty, Inc.* v. *Columbia Broadcasting System, Inc.*, 84 Ill.App.3d 862, 406 N.E.2d 61 (1980) (juxtaposition of plaintiff-realtor's advertising signs in midst of televised report on "panic peddling" and "blockbusting" in changing Chicago neighborhoods); *Andreani* v. *Hansen*, 80 Ill.App.3d 726, 400 N.E.2d 679 (1980) (statement that plaintiff land developers were greedy and that their conduct in refusing to sell land to village for badly needed park, thereby forcing condemnation proceedings, was disgraceful); *Van See Construction Company, Inc.* v. *Jensen & Halstead, Ltd.*, 79 Ill.App.3d 1084, 399 N.E. 2d 278 (1979) (statement that plaintiff, the general contractor on a public school renovation project, was not painting the building properly); *Anderson* v. *Matz*, 67 Ill.App.3d 175, 384 N.E.2d 759 (1978) (statement that plaintiff-physician's diagnosis of personal injury victim's condition was not worthy of consideration by insurance

company evaluating merits of personal injury lawsuit); *Bougadis* v. *Langefeld*, 69 Ill.App.3d 1010, 387 N.E.2d 965 (1979) (statement that plaintiff, the building commissioner for the Village of Berkely, had solicited contributions for Little League baseball from a local merchant in terms that sounded like "extortion").

As the Appellate Court recognized in this case, the *Reader* article accusing petitioner of being a "slum landlord" is unquestionably capable of an innocent construction. As properly reasoned by the court, "the terms 'slum landlord' and 'slumlord' can be construed to mean that plaintiff owned buildings in a poor and dirty neighborhood or, simply stated, that plaintiff was a landlord in a slum." The Appellate Court, in making this determination, correctly applied well-established Illinois law and review by this Court is simply unwarranted.

B. The Respondents' Article Is Not Libelous Per Se.

The Appellate Court also properly held that petitioner's claim was fatally defective because the two-sentence reference to petitioner simply did not constitute libel *per se*. Nothing in respondents' publication charges petitioner with either a serious crime involving moral turpitude or of unfitness in his profession as an attorney.

1. The Article Does Not Accuse Petitioner Of The Commission Of A Serious Crime.

For a publication to be libelous per se, the crime imputed must be either "infamous" or an indictable offense, involve moral turpitude, and be punishable by death or by imprisonment rather than by a fine. *Mitchell* v. *Peoria Journal Star, Inc.*, 76 Ill.App.2d 154, 160, 221 N.E.2d 516, 520 (1966); *Reed* v. *Albanese*, 78 Ill.App.2d 53, 60, 223 N.E.2d 419, 423 (1966).

Petitioner contends that the *Reader* article, referring to him as a "slum landlord," accuses him of engaging in criminal housing management under Illinois law. Petitioner is factually and legally wrong. At most, the statement in question does no more than imply generally that petitioner may have violated the building code, and later states that he may lose his real estate license because of such violations. Since violations of the building code are only punishable by fine, do not involve moral turpitude and do not constitute infamous crimes, respondents' statements are not libelous *per se* for imputing the commission of a crime. *See, e.g., Bruck* v. *Cincotta,* 56 Ill.App.3d 260, 264, 371 N.E.2d 874, 878 (1977) (charges of Chicago Municipal Code violations are not defamatory *per se* for imputing to plaintiffs the commission of a crime since violators are subject only to fine and have not committed an indictable offense involving moral turpitude) and *Mitchell* v. *Peoria Journal Star, Inc.,* 76 Ill.App.2d 154, 160, 221 N.E.2d 516, 519 (1966) (charge of violations of a municipal liquor ordinance for which a fine was imposed is not libelous *per se*). Again, the Appellate Court relied on well-settled Illinois law to conclude that respondents' article did not charge petitioner with either an infamous crime or one of moral turpitude and, therefore, could not support a claim for libel *per se.*

2. The Article Does Not Accuse Petitioner of Professional Unfitness As An Attorney.

Petitioner's claim of libel *per se* based upon the contention that respondents' publication accused him of professional unfitness as an attorney was also properly rejected by the Appellate Court.

It is well-established under Illinois law that in order for a statement to constitute libel *per se* for imputing professional incompetence, it must refer to the plaintiff in relation to his *particular* occupation. *See, e.g., Hambric* v. *Field Enterprises, Inc.,* 46 Ill.App.2d 355, 196 N.E.2d 489 (1964). In a license revocation hearing before the DRE, petitioner filed an affidavit in which he stated that the practice of law was his *sole* vocation from 1929 and that he has never entered into the real estate brokers business. Respondents' two sentence reference to petitioner is *silent* with respect to petitioner's competence as an attorney. In fact, it does not even suggest or imply that petitioner is an attorney. Therefore, based again upon established Illinois precedents, the Appellate Court properly concluded that

> Since none of defendants' statements alluded to plaintiff's qualifications or competence as a lawyer, we must reject plaintiff's contention that his professional fitness as a lawyer was attacked. See generally *Reed* v. *Albanese* (1966), 78 Ill.App.2d 53, 223 N.E.2d 419; *Hambric* v. *Field Enterprises, Inc.,* (1964) 46 Ill.App.2d 355, 196 N.E.2d 489.

In summary, petitioner clearly failed to state a claim for libel *per se* and review by this Court is simply not justified.

CONCLUSION

The petitioner suggests no valid reason why this Court should review the dismissal of his complaint. Petitioner's status as an aggrieved litigant whose claim has been rejected on the basis of settled legal rules is no different than that of numerous other disappointed suitors. Petitioner's unfounded assertions of error by the Appellate Court of Illinois do not suffice to invoke this Court's jurisdiction or to impose yet another round of appellate review upon these respondents. The Supreme Court of Illinois did not accept petitioner's appeal. This Court should similarly refuse petitioner's request for review. The well considered opinion of the Appellate Court of Illinois should be allowed to stand as the final disposition of this action. For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEVEN B. BELGRADE
ROAN & GROSSMAN
55 West Monroe Street
Suite 800
(312) 263-3600
Chicago, Illinois 60603
(*Counsel of Record for Respondents*)

DAVID W. ANDICH
ROAN & GROSSMAN
55 West Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 263-3600